LAW OFFICES OF KELLY AVILES
KELLY AVILES (State Bar No. 257168)
1502 Foothill Blvd., #103-140
La Verne, California 91750
Telephone: (909) 991-7560
kaviles@opengovlaw.com

LOS ANGELES TIMES COMMUNICATIONS LLC
JEFF GLASSER (State Bar No. 252596)
2300 E. Imperial Highway,
El Segundo, California 90245
Telephone: (213) 237-5000
jeff.glasser@latimes.com

THE LAW OFFICE OF KARLENE GOLLER
KARLENE GOLLER (State Bar No. 147065)
507 Bellefontaine Street
Pasadena, CA 91105
Telephone: (213) 910-9112
karlene@karlenegoller.com

Attorneys for Interveners
LOS ANGELES TIMES COMMUNICATIONS LLC
and SOUTHERN CALIFORNIA PUBLIC RADIO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, Petitioner/Plaintiff, v. COUNTY OF LOS ANGELES, et al., Respondents/Defendants, LOS ANGELES TIMES COMMUNICATIONS LLC and SOUTHERN CALIFORNIA PUBLIC RADIO, Proposed Media Interveners.	Case No.: 19STCP00166 (related case no. 19STCP00118) **OPPOSITION OF MEDIA INTERVENERS TO PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF FILED BY PETITIONER ASSOCIATION FOR LOS ANGELES COUNTY DEPUTY SHERIFFS** Date: February 15, 2019 Time: 9:30 a.m. Dept.: 86 Judge: Hon. Mitchell Beckloff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Evidence Code

Civil Code

Government Code

Welfare and Institutions Code

Penal Code

Treatises

I. Introduction.

Last year, the California Legislature enacted SB 1421, a landmark transparency measure that sought to lift the veil on police officer disciplinary records. State Senator Nancy Skinner, the sponsor of the bill, stated that SB 1421 would "build trust" between law enforcement and communities by opening up key records reflecting police misconduct and discipline to the public. (Levine Decl., Ex. A, p. 7.) She made these comments in the context of rising protests about police shootings and other claims of dishonesty and bad behavior across the state. In Los Angeles County, public debate was stoked by the Los Angeles Times' publication of the secret Brady list of nearly 300 Sheriff's deputies with histories of misconduct and KPCC's podcast on a deputy who shot at four people in South Los Angeles within seven months.[1]

The promise of SB 1421 was that the public would finally have a chance to learn more about how law enforcement investigated and disciplined these deputies and other officers. They would know more about the firing of a deputy such as Caren Carl Mandoyan, who left the Sheriff's Department in 2016 amid allegations of domestic violence and stalking but was just reinstated by new Sheriff Alex Villanueva.[2] They would have access to detailed records reflecting serious allegations of sexual misconduct by deputies like Thomas Jensen, who was accused of fondling a woman he had been assigned to protect from an ex-boyfriend who was a gang member, and Casey Dowling, who was accused of molesting a woman when she was 14.[3] They would gain insight into how the Sheriff's Department investigated serious accusations of dishonesty by deputies such as Jose Ovalle, who was alleged to have planted evidence (taco sauce on a shirt to resemble blood), and James Peterson, whose conflicting accounts of searches and stops on I-5 led federal prosecutors to drop several drug cases.[4]

---

[1] See https://www.latimes.com/local/la-me-sheriff-brady-list-20171208-htmlstory.html; https://www.scpr.org/news/2018/04/04/82083/la-sheriff-watchdog-is-scrutinizing-shooting-inves/. Episodes of the podcast, *Repeat*, are available at https://www.scpr.org/repeat.

[2] See https://www.latimes.com/local/lanow/la-me-alex-villanueva-sheriff-rehire-mandoyan-20190114-story.html.

[3] See https://www.latimes.com/local/california/la-me-2014-brady-list-deputies-20171208-htmlstory.html

[4] See https://www.latimes.com/local/california/la-me-brady-list-secrecy-court-20180809-htmlstory.html; https://www.latimes.com/local/lanow/la-me-police-misconduct-secrecy-federal-20180810-htmlstory.html

While the public interest remains sky high in access to these records reflecting allegations of misdeeds by those entrusted with protecting us, the unions have launched a last-ditch effort to avoid the accountability and transparency that SB 1421 was intended to bring. They are filing lawsuits around the state claiming that SB 1421 cannot be applied to any past instances of misconduct, no matter how egregious.[5] If the unions succeed, the public will remain in the dark about investigations of incidents of sexual assault, gross misconduct, and uses of force that result in serious bodily injury and even death by officers.

The secrecy surrounding these troubling incidents was exactly what the Legislature intended to bring to light when it passed SB 1421.

> The public has a right to know all about serious police misconduct, as well as about officer- involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety. (SB 1421, § 1(b).)

By amending the procedures for disclosure of police personnel records, the law attempts to lift the cloud of secrecy that has so long obscured issues of serious police misconduct, officer-involved shootings, and other uses of force by law enforcement officers in California. Prior to the enactment of SB 1421, police personnel records were only accessible in California civil or criminal discovery upon a showing of "good cause" made in accordance with the procedures set out in Evidence Code sections 1043 and 1045.

Now, the law guarantees public access under the procedures set forth in the CPRA. It mandates that the public must have access to all records related to four categories of information as of January 1, 2019. The four categories are (1) incidents involving the discharge of a firearm at a

---

[5] After failing to convince the other two branches of government that the law should not apply to records related to past conduct, the Unions have deluged courts around the state with similar lawsuits. *See* e.g., *Riverside Sheriffs Association v. County of Riverside, et al.,* Riverside County Case No. RIC1900789; *Ventura County Sheriffs v. County of Ventura, et al.*, Ventura County Case No. 56-2019-00523492-CU-WM-VTA; *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles, et al.*, Los Angeles County Case No. 19STCP00166; *Los Angeles Police Protective League v. City of Los Angeles*, Los Angeles County Case No. 18STC903495; *San Bernardino County Sheriff's Employee's Benefit Association v. County of San Bernardino, et al.*, San Bernardino County Case No. CIVDS1900429; *San Bernardino County Sheriff's Employee's Benefit Association v. County of San Bernardino, et al.*, Cal. Supreme Court Case No. S253115 (Cal. Supreme Court denied both the petition ***and the request to stay*** on 1/2/19.)

person by a peace officer; (2) incidents involving the use of force by a peace officer against a person, resulting in death or great bodily injury; (3) incidents in which a sustained finding was made by a law enforcement agency or oversight agency that a peace officer or custodial officer engaged in the sexual assault of a member of the public; and (4) Incidents in which a sustained finding was made by a law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, and the destruction, falsifying, or concealing of evidence.

(*Ibid.*; See Pen. Code § 832.7, subd (b) [as amended].)

Thus, the law represents a procedural change in how and when records are made available to the public—as of January 1— and cannot be deemed "retroactive" because it provides prospective rights to inspect existing records. ***See further* Section II, *infra*.**

The plain language of the statute is agnostic as to when the records were created, and the legislative history confirms that the law was intended to uncover how law enforcement agencies handled prior incidents where deadly force was used or serious misconduct was found. Granting the Association's petition would frustrate the intent of the law, which aims to promote government accountability and restore the public's faith in the legitimacy of law enforcement by increasing public access to records of serious police misconduct, officer-involved shootings, and other serious uses of force. ***See further* Section III, *infra*.**

In addition to the substantive reasons set forth above, the Petition should also be denied for two procedural reasons. First, the Association lacks standing to assert the privacy rights of its members. *Association for Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC* (2015) 239 Cal.App.4th 808, 821 ("*ALADS*"). ***See further* Section IV, *infra*.** Second, this lawsuit seeks declaratory relief of whether the CPRA requires disclosure of certain records. The Supreme Court has held that lawsuits for declaratory relief frustrate the purpose of the CPRA by eliminating the statutory protections and incentives for members of the public seeking disclosure of public records. *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 423. ***See further* Section V, *infra*.**

For all these reasons, the Association's Petition should be denied on substantive and procedural grounds.

II. The Association's Retroactivity Analysis Is Not Applicable Here.

The union asks this Court to stop the disclosure of records regarding police misconduct and uses of force opened as a result of SB 1421, claiming it cannot be applied "retroactively." This position assumes—without analysis—that SB 1421 is, in fact, "retroactive." It is not. The question of retroactivity only arises when the Legislature "has changed the legal consequences of past conduct by imposing new or different liabilities based on such conduct." *Robertson v Rodriguez* (1995) 36 Cal.App.4th 347, 356 ("*Robertson*").

Procedural changes in the law, which do not change the consequences of past conduct, are not "retroactive." The effect of [procedural changes] is actually prospective in nature since they relate to the procedure to be followed in the future." *Olivas v. Weiner* (1954) 127 Cal.App.2d 597, 601; *see also Robertson*, 36 Cal.App.4th at 356 (anti-SLAPP procedure was available for causes of action arising prior to the enactment of Section 425.16 because it did "not change the legal effect of past conduct" and the new procedure was "merely a procedural screening mechanism for determining whether …to permit the matter to go to" trial); *Stauch v Superior Court* (1980) 107 Cal.App.3d 45, 49 (statutes of limitations are procedural in nature); *Tapia v. Super Ct.* (1991) 53 Cal.3d 282, 288 ("retroactivity" test not appropriate for laws that "address the conduct of trials which have yet to take place, rather than criminal behavior which has already taken place"). Procedural changes may be given effect as to pending and future litigation even if the underlying cause of action accrued before the statute took effect. *Pacific Coast Med. Enters. v Department of Benefit Payments* (1983) 140 Cal.App.3d 197, 205; *Olson v Hickman* (1972) 25 Cal.App.3d 920, 922; *see also* Continuing Education of the Bar, *California Attorney Fee Awards*, § 2.6 ("statutes that are merely procedural are applicable to all pending cases, even if the cause of action arose before the statute's effective date.")

This is the case for SB 1421. Like all provisions in the CPRA, it applies to all records in existence at the time of the enactment. The CPRA "creates 'a presumptive right of access to any record *created or maintained* by a public agency that relates in any way to the business of the public agency.'" *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616 (quoting *Sander v. State Bar of*

California (2013) 58 Cal.4th 300, 323) (emphasis in original); accord *Williams v. Superior Court* (1993) 5 Cal.4th 337, 346 (CPRA applies to all public records). It is well-established that the CPRA requires public agencies to provide access to their existing records, where no exemption to disclosure applies. *Sander,* 58 Cal.4th at 32 (every record "must be disclosed unless a statutory exception is shown"); *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 223 ("The CPRA generally presumes that ***all documents maintained*** by a public entity are subject to disclosure …") (emphasis added); *Bd of Pilot Commissioners v. Super. Ct.* (2013) 218 Cal.App.4th 577, 597 ("The CPRA pertains to 'disclosable public records in the *possession* of the agency'") (italics in original). When the Legislature passed the CPRA, the Legislature promised "access to information concerning the conduct of the people's business." (Gov't Code § 6250.) It did not limit such access to information created *after* 1968. Instead, where the Legislature intended the CPRA to only apply to records after a certain date, it has said so explicitly.[6]

The definition of "public records" under the CPRA includes records that are "prepared, owned, used, or retained by" an agency. (Govt. Code§ 6252(e).) In responding to a CPRA request, an agency generally must determine if it has responsive pubic records in its possession, notify the requestor whether responsive, disclosable public records exist, and notify the requestor if any responsive records are being withheld from disclosure pursuant to an applicable exemption. (Govt. Code§§ 6253(c), 6255(a) & (b); *Haynie v. Super. Ct.* (2001) 26 Cal.4th 1061, 1072.) Thus, by definition, the CPRA applies to records that already exist. (*See also* Gov't Code § 6252 (defining "writing" subject to the Act as coming in many forms, "regardless of the manner in which the record ***has been stored***," which presupposes that the records have been created and stored previously).)

---

[6] *See* Gov't. Code § 6254(q) ("[e]xcept for the portion of a contract containing the rates of payment, contracts for inpatient services entered into pursuant to these articles, on or after April 1, 1984, shall be open to inspection one year after they are fully executed. If a contract for inpatient services that is entered into prior to April 1, 1984, is amended on or after April 1, 1984, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after it is fully executed."."); Gov't. Code § 6268 ("[e]xcept as to enrolled bill files, press releases, speech files, or writings relating to applications for clemency or extradition, this section shall not apply to public records or other writings in the direct custody or control of any Governor who held office between 1974 and 1988 at the time of leaving office.")

The union's "retroactivity argument" and its attempts to engraft an inapposite legal argument to distinguish between laws that are "retrospective" and laws that are "prospective" have no place here. "It is a misnomer to designate [the statute] as having retrospective effect." *Tapia,* 53 Cal.3d at p. 288; *see also Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839-840; *Quarry v. Doe I* (2012) 53 Cal.4th 945, 955-956. While the "retroactive" analysis may make sense in other areas of the law—for example, changes in criminal law that could cause classes of people to remain in jail longer (or lead to mass releases of prisoners)—California courts have never applied these principles to public access laws, and for good reason.

The language of SB 1421 does not change the consequences of past conduct; it changes procedures for accessing public records—certain police personnel records—regardless of the date of the incident that the records relate to or when the records were created. The law is procedural in nature and cannot be deemed "retroactive." It provides prospective rights to inspect ***existing*** records currently in the possession of the agency under the CPRA. SB 1421 declares that any record relating to a qualifying incident ***must be made available for inspection as of January 1, 2019.*** No one contends that the specified records were available for inspection before January 1, 2019. If a CPRA request was submitted a year ago, the public would not be able to "retroactively" go back and inspect records, even if such time travel was possible. However, as of January 1, inspection is permitted. The law is not "retroactive" because it does not change the procedure for inspection prior to 2019. In other words, because SB 1421 deals with the availability of public records, the date a record was created or the date of the incident described in the record are not relevant - only the duty of disclosure is created.

This is confirmed by Legislative Counsel, which explains that SB 1421 affects the procedure for access. "Existing law…prohibits access of these records except by discovery," and SB 1421 "would require, notwithstanding any other law, certain peace officer or custodial officer personnel records and records relating to specified incidents, complaints, and investigations involving peace officers and custodial officers to be made available for public inspection pursuant

to the California Public Records Act."[7] The Legislative Counsel obviously was referring to records in existence—and that language was written in 2018 before the law's enactment.

Retroactivity looks at whether a new law affects a cause of action that accrued before the change in the law. *See Robertson,* 36 Cal.App.4th at 357 ("statute is applicable to a cause of action which arose before its effective date.") In this case, the cause of action for any member of the public requesting access to records only accrues after January 1, 2019, the effective date of the law. There is no real issue concerning retroactivity and SB 1421 at all; the argument is a red herring.

No "vested rights" are imperiled by the application of this new access to public records law, either, which might require an examination of a law's retroactivity. As a matter of public policy, there is no vested right in keeping instances of sexual assault by an officer a secret. There is no right to confidentiality when an officer kills a member of the public. There is no vested right to keep secret specified public records containing substantiated findings of perjury, filing of false reports, or destruction, falsifying, or concealing of evidence.

Contrary to what the Association wants this Court to believe, absolute confidentiality was ***never*** a "right" officers possessed. The records have always been subject to disclosure in criminal or civil litigation, subject to the procedural requirements imposed by Evidence Code sections 1043 and 1045.[8] And those procedures were never applicable in actions pending in federal court.[9] Contrary to Petitioner's contention, neither peace officer personnel records nor information obtained therefrom have ever been sacrosanct under either California constitutional or statutory law. None of the decisions cited by Petitioner hold to the contrary.

---

[7] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1421

[8] See Pen. Code § 832.7, subd. (f) ("Nothing in this section shall affect the discovery or disclosure of information contained in a peace or custodial officer's personnel file pursuant to Section 1043 of the Evidence Code."]; Evid. Code § 1043 [providing for discovery of "peace or custodial officer personnel records or records" upon notice and a motion complying with the requirements of the statute].)

[9] *Kelly v. San Jose* (N.D.Cal. 1987) 114 F.R.D. 653, 655-656 ("State privilege doctrine, whether derived from statutes or court decisions, is not binding on federal courts in these kinds of cases"); *see also Breed v. United States District Court* (9th Cir. 1976) 542 F.2d 1114, 1115 (contention that the doctrine of governmental privilege precludes disclosure of personnel records, whether or not established in California state courts, "is not the law of this circuit"); *Kerr v. U.S. Dist. Ct. for N.D. Cal.* (9th Cir. 1975) 511 F.2d 192, 197 ("In cases brought under federal statutes, questions of privilege are resolved by federal law").

The fundamental premise of the Association's argument is entirely wrong. No one has the burden to show that SB 1421 applies to records created prior to January 1. The proponent of nondisclosure must show that records are exempt from disclosure. *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071. Here, the proponent of non-disclosure is the Association, which bears the heavy burden to justify non-disclosure under the CPRA. This burden is *per se* impossible to meet because SB 1421 requires that all records regarding qualifying incidents of misconduct or uses of force are disclosable under the CPRA *notwithstanding any other law*. Therefore, the Association has no chance of prevailing on the merits and cannot meet the high burden necessary for an injunction.

Other cases that have addressed analogous statutory revisions to the required disclosure of sensitive information have held that they are applicable to pre-existing records. For example, amendments to Welfare and Institutions Code section 6603, providing for the disclosure of communications to mental health professionals by prisoners being evaluated for potential commitment as sexually violent predators, were properly applied to records of such communications created prior to the effective date of the legislation that enacted the amendments. *See People v. Superior Court (Smith)* (2018) 6 Cal.5th 457, 465; *People v. McClinton* (2018) 29 Cal.App.5th 738, 753. Similarly, a statute providing for expungement of records relating to prosecution of certain persons found to be innocent was held to apply retroactively. *People v. White* (1978) 77 Cal.App.3d Supp. 17, 21-22.[10]

Court decisions are the same. For example, recently the Supreme Court held "that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure…." *City of San Jose*, 2 Cal.5th at 614. The Court's decision necessarily applies to all records in existence at the time of the decision. No one, not even the Court, questioned whether it would apply to emails that had been sent before the date of the

[10]In a decision on a similar question relating to access to medical records, the Florida Supreme Court explained, "the use of the word 'retroactive' may be somewhat confusing in the context herein since a patient who may have benefited from the right of access now granted obviously cannot go back in time and inform a past decision made about medical care then contemplated." *Florida Hospital Waterman v. Buster* (2007) 984 So.2d 478, 487 (ultimately holding that use of the word "any" to define records clarified the scope of the statute and the "effective date merely sets forth the date patients obtained the right to receive the records requested.")

Court's decision. This is clearly because the CPRA provides for inspection of records. Nothing in a law or a court decision affecting or interpreting the CPRA changes the nature of the record itself – only whether that record can be viewed or copied by the public in accord with CPRA procedures.

Cases from other states have come to the same conclusion, finding that expanding the right to access previously-created documents constitutes a prospective, not "retroactive," application of public records laws. *See State ex rel. Beacon Journal Publishing Co. v. University of Akron* (1980) 64 Ohio St.2d 392, 396; *State of Hawai`i Organization of Police Officers v. Soc'y of Professional Journalists-University of Hawai`i Chapter* (1996) 83 Hawaii 378, 390; *Cellular South, Inc. v. BellSouth Telecommunications* (Miss 2017) 214 So.3d 208, 213-216; *Mollick v. Township of Worcester* (Pa 2011) 32 A.3d 859, 869-870 (state's Right to Know Law is remedial legislation that applies to requests for information after the effective date of the statute (but regardless of the date documents were created), and is thus not impermissibly "retroactive" application).

III. SB 1421 Was Intended To Apply To All Existing Records, Regardless Of When The Incidents Described In Those Records Occurred.

The Supreme Court has noted "on a number of occasions in the past we have found that even when a statute did not contain an express provision mandating retroactive application, the legislative history or the context of the enactment provided a sufficiently clear indication that the Legislature intended the statute to operate retrospectively that we found it appropriate to accord the statute a retroactive application. [Citation.]" *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1210. If a statute's language is clear, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.

SB 1421's plain language provides that, notwithstanding any other law including Penal Code Section 832.7(a) and Government Code Section 6254(f), all records relating to a qualified incident which are "maintained by any state or local agency shall not be confidential and shall be made available for public inspection...." (Penal Code§ 832.7(b)(l).) The plain words of that provision underpin the proposition that any specified records "maintained" by the Department, regardless of when created, are no longer subject to statutory confidentiality, and are subject to disclosure pursuant to CPRA requests received after January 1, 2019.

A closer look at the wording of the statute supports this interpretation. In particular, the ordinary and commonly understood meaning of the past tense verb "maintained" is "kept possession and care of." (Deluxe Black's Law Dictionary 953 (6th Ed. 1988); see *ibid.* [defining the present tense verb "maintain" to mean "hold; hold or keep in an existing state or condition"]; Webster's Ninth New Collegiate Dictionary 718 (1988) [defining "maintain" as "to keep in an existing state"].) More specifically, to "maintain" a record means "to keep [it] in existence," or to "preserve" or "retain" it. *Moghadam v. Regents of Univ. of Calif* (2008) 169 Cal.App.4th 466, 479-480, quoting *Owasso Independent Sch. Dist. No. I-OJ 1 v. Falvo* (2002) 534 U.S. 426, 432-433. By using the word "maintained" as a trigger for disclosure, the Legislature intended SB 1421 to apply to all specified records that an agency has kept in existence—*i.e.*, that it has preserved or retained—at the time a CPRA request is made, regardless of when such records were created. Had the Legislature intended to make some records disclosable and keep others confidential based on when the records were created or when the underlying incidents occurred, it could have expressly specified such a time limitation and application. (See *Fredericks,* 233 Cal.App.4th at p. 218 [rejecting argument that Section 6254(f)(2) of the CPRA did not require disclosure of records more than 60 days old, because the "plain terms" of the statute "do not include an express time limitation on production of only 'contemporaneous' or 'current' records"].) Because the Legislature did not do so, '[t]here is no basis in the plain language of the statute to read into it any [such temporal] limitation.' *Id.* at 234.

Second, SB 1421 must be read, understood, and interpreted in the context of the language of the statute and its apparent purpose. *People v. Valencia* (2017) 3 Cal.5th 347, 357 ("the words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible."); *Evangelatos*, 44 Cal.3d at p. 1210 ("the legislative history or the context of the enactment provided a sufficiently clear indication that the Legislature intended the statute to operate retrospectively that we found it appropriate to accord the statute a retroactive application.") In essence, SB 1421 provides that certain records of police misconduct are subject to disclosure under the California Public Records Act.

Under the CPRA, public records are defined broadly, and they are either subject to access or exempt from disclosure, under the express provisions of the CPRA itself. (Gov. Code §§ 6252, 6254, 6255.) There is no temporal component or limitation on the definition of public records. (See Gov. Code § 6252.) The Legislature enacted SB 1421 in the context of this existing statutory framework. This alone demonstrates that SB 1421 was intended to apply to all records, not just records related to conduct occurring after it takes effect.

The Legislature intended from the outset, that SB 1421 would provide access to records created prior to January 1, 2019, the date the law went into effect. This understanding is expressed in the summary of the argument in opposition to the legislation in the original committee report on the bill: "Moreover, ou[r] reading of Senate Bill 1421 is that making the records of an officer's lawful and in policy conduct [accessible] is retroactive in its impact." (Levine Decl., Ex. A, p. 16.) SB 1421 contains no language restricting its application to future conduct only.

In fact, the unions made the same arguments to the Legislature, and the Legislature moved forward with the bill despite their objections to its "retroactive" impact. The Legislature received early opposition to SB 1421 – in advance of a hearing on April 17, 2018 - on the grounds that application of the statute to records of pre-enactment conduct would have a retroactive impact. (Levine Decl., Ex. A, pp. 1, 16 (noting that a peace officer association's reading of SB 1421 is that the law "is retroactive in its impact" because "records are available for public inspection irrespective of whether or not they [sic] occurred prior to the effective date of SB 1421".) However, the Legislature did not amend the operative language of Section 832.7(b)(l) after having received such opposition to the April 2, 2018 version of SB 1421. Its failure to do so indicates the Legislature intended SB 1421 to provide for disclosure of records pre-dating January 1.

Other portions of the legislative history support this finding. For example, the Senate Committee on Public Safety analysis of SB 1421 notes that the "bill also states that records from prior investigations or assessments of separate incidents are not disclosable unless they are independently subject to disclosure under the provisions of the act." (Levine Decl., Ex. A, p. 7.) If the Legislature never intended it to apply to past incidents, it would not need a carve out for records from prior investigations. The same analysis notes that "[i]n no case may an agency

withhold [a] record for longer than 180 days from the date of the use of force." (Levine Decl., Ex. A, p. 7.) This means that withholding the very records that the Association seeks to stop disclosure of here would contravene the plain language of the statute.

The Legislature also understood that law enforcement agencies are required by law to retain records relating to complaints against officers for a minimum of five years. (Levine Decl., Ex. A, p. 4.) The Legislature understood that the "[e]ffect of [t]his [b]ill" was to "open[] police officer personnel records ... allowing local law enforcement agencies ... to provide greater transparency around only the most serious police complaints." (Levine Decl., Ex. A, p. 8; Ex. D at p. 7.) Thus, the intended effect of SB 1421 was to throw "open" the public records maintained by law enforcement agencies that previously had been closed, by removing the statutory confidentiality protections previously bestowed upon such records. (See Deluxe Black's Law Dictionary 1089 (6th Ed. 1988) (defining "open" to mean "to render accessible, visible, or available; to submit or subject to examination, inquiry, or review, by the removal of restrictions or impediments").)

SB 1421 was enacted in the context of and response to a pitched public debate about the inability of the public generally, and the families of those involved in incidents regarding the use of force, in particular, to obtain any meaningful information about such incidents or the investigation of the incidents by law enforcement agencies.[11] The legislative history makes clear that those very incidents provided the impetus for the legislation. (Levine Decl., Ex. E, p. 8.) The California Newspaper Publishers Association, the co-sponsor of the bill, urged the Legislature to pass SB 1421 to "cure the problems secrecy has sown over the last 40 years." *Id.* The Association's interpretation of the law means that no information about these incidents would ever become public, which is obviously in contradiction of the Legislature's intent.

SB 1421 is a remedial statute, designed to remedy restrictions on public scrutiny of law enforcement records and of underlying use of force and serious, confirmed misconduct by law enforcement officials, all of which have followed the Supreme Court's decision in *Copley Press, Inc. v.*

[11] *See* https://www.latimes.com/politics/la-pol-ca-new-police-transparency-legislation-20180330-story.html; https://www.latimes.com/politics/la-me-california-police-discipline-secret-20180815-story.html; https://www.sacbee.com/opinion/editorials/article214773010.html.

Superior Court (2006) 39 Cal.4th 1272. (Levine Decl., Ex. E, p. 5-7.) Legislative remedies must be construed in a manner that forwards rather than frustrates their purpose. *See*, e.g., *Continental Cas. Co.*, 46 Cal.2d at pp. 434-435 ("The rule of law in the construction of remedial statutes requires great liberality, and wherever the meaning is doubtful, it must be so construed as to extend the remedy"); *People v. White* (1978) 77 Cal.App.3d Supp. 17, 20-21 ("A remedial statute of this type should be liberally construed to promote the underlying public policy. If the meaning is doubtful, the statute must be construed as to extend the remedy"). This provides additional support for the conclusion that SB 1421 can and should be applied to provide access to existing records, currently in possession of an agency, regardless of when they were created.

If there were any remaining doubt, the Senate removed it on January 31, 2019, when it unanimously adopted a letter from Senator Skinner, the author of the SB 1421, that explicitly states "it is my understanding in enacting SB 1421 that the change in the law applies to all disclosable records whether or not they existed prior to the date the statute went into effect. This is the standard practice for public records legislation in California." (Exs. G-H.)

The fundamental purpose of SB 1421 is to "promote public scrutiny of, and accountability for, law enforcement." (Levine Decl., Ex. E, p. 7.) It promotes this purpose by allowing access to specific records and to information about particular law enforcement officials (Pen. Code § 832.7, subd. (b) [as amended]), and by ensuring the public can monitor whether and how law enforcement agencies are addressing misconduct by employees (Levine Decl., Ex. A, p. 14, 15-16.) Petitioner wants to prevent disclosure of historical records necessary to determine whether particular officials have a pattern or practice of misconduct, and whether the agencies that employ them are permitting such patterns to continue. By denying access to records of past misconduct that are essential for analysis and scrutiny, Petitioner's interpretation defeats the purpose of the legislation.

IV. <u>The Association Lacks Standing To Assert The Privacy Rights Of Its Members.</u>

A party seeking an injunction must demonstrate "great and irreparable injury, to a party to the action." (Code Civ. Proc. § 526(a)(2).) However, no party to this action will suffer injury from the disclosure of the information at issue here. Instead, the Association attempts to assert the privacy rights of its members. In the Petition, the Association claims that SB 1421 represents "a substantial and adverse change to the existing privacy rights of the Petitioner's represented peace

officers" (Pet., ¶ 14) and that the Association's "represented employees will suffer irreparable harm to their statutory and constitutional privacy rights…." (Pet. ¶ 22).

Even assuming, *arguendo*, that there were a reasonable expectation of privacy in records related to serious misconduct, officer-involved shootings, and other uses of force by law enforcement officers, a claim seriously undermined by existing civil procedure allowing for discovery of such records, such a privacy right is exclusive to each officer and does not extend to the Association, a fact of which the Association is aware.

In *ALADS*, 239 Cal.App.4th at 821, a sheriff's union sued to stop the Los Angeles Times from publishing the same type of information that it seeks prevent disclosure of here – information related to police personnel records. *Id.* at 812-813. In response, the Second District Court of Appeal held that the Association lacked standing. "The first problem with ALADS' argument is that any privacy right in the information contained in deputies' employment applications belongs to the deputies (and their employer, LASD), not to the deputies' labor union. 'It is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded.'…ALADS has no standing to prosecute this case." *Id.* at 821 (internal citations omitted.)

This is fatal to the Association's petition here as well. "It is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded." *Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59, 62 [emphasis in original] (family members could not bring privacy suit against newspaper that published obituary revealing decedent's criminal conviction); *see also Roberts v. Gulf Oil Corp.* (1983) 147 Cal.App.3d 770, 790–793 (emphasis in original] [California's "constitutional [privacy] provision simply does not apply to corporations. The provision protects the privacy rights of *people*."] As the Association's argument relies on the alleged privacy rights of its members, it has no standing to stop disclosure in this case.

V. <u>This Action Undermines The CPRA's Statutory Scheme.</u>

In *Filarsky*, 28 Cal.4th at 423, the Supreme Court barred declaratory relief actions to determine whether records were subject to disclosure under the CPRA, reasoning that "[p]ermitting a public agency to circumvent the established special statutory procedure" "would eliminate

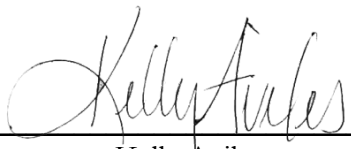
statutory protections and incentives for members of the public…thus frustrating the Legislature's purpose of furthering the fundamental right of every person in this state to have prompt access to information in the possession of public agencies."[12]

In this suit, the Association is doing the same thing - seeking a declaration from this Court as to whether public records are disclosable. The Association explicitly seeks declaratory relief "so the parties may ascertain their respective legal rights and duties" because "Defendants intend to make such peace officer personnel records and information…available for public inspection in response to requests under the CPRA." [13]

These suits eliminate the CPRA's statutory protections for requestors, encourage delay and gamesmanship by public agencies, all while forcing requesters to either join in litigation they did not decide to initiate or leave to chance the enforcement of the requester's and the public's rights to obtain the requested documents. This is true here as The Times and SCPR are forced to join this litigation to protect their rights to obtain records responsive to their pending CPRA requests.

DATED: February 7, 2019

LAW OFFICES OF KELLY AVILES



Kelly Aviles
Attorney for Media Interveners

[12] Accord *City of Santa Rosa v. Press Democrat* (1986) 187 Cal.App.3d 1315, 1322-1323 (rejecting public agency's attempt to bring lawsuit seeking declaration it did not have to disclose records).

[13] Only one case, *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, provides any authority for "reverse-CPRA" cases, like the instant action. Even in *Marken*, a case that is factually distinguishable because it was filed by an individual asserting his own privacy rights, the Court recognized that the propriety of the action was not "free from doubt." *Id.* at 1265. After *Marken*, the Supreme Court stated that the issue of the propriety of reverse-CPRA actions "remains open" and can be reasserted "in any future proceedings." *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 66. Last year, in *Pasadena Police Officers Association v. City of Pasadena* (2018) 22 Cal.App.5th 147, 166, the Second District Court of Appeal decided that The Times could recover fees under the private attorney general statute against a union and two officers that lost a reverse-CPRA action seeking to stop disclosure of public records (a consultant's report on the shooting of an unarmed teenager).

PROOF OF SERVICE

I reside or work within in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1502 Foothill Blvd., Suite 103-140, La Verne, CA 91750.

On **February 7, 2019**, I served the foregoing documents described as **OPPOSITION TO PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF** on the parties in this action as listed in the attached service list by the following means:

Service List

Alexandra Zuiderweg
Lana Choi
Office of Los Angeles County Counsel
211 W. Temple Street, 8th Floor
Los Angeles, CA 90012
azuiderweg@counsel.lacounty.gov
lchoi@counsel.lacounty.gov

Geoffrey S. Sheldon
Liebert Cassidy Whitmore
6033 West Century Boulevard, 5th Floor
Los Angeles, CA 90012-2713
gsheldon@lcwlegal.com

Attorneys for Respondent COUNTY OF LOS ANGELES

Richard Levine
Jacob A. Kalinski
RAINS LUCIA STERN ST. PHALLE & SILVER, PC
1428 2nd Street, Suite 200
Santa Monica, CA 90401
jkalinski@rlslawyers.com
rlavine@rlslawyers.com

Attorneys for Petitioner ASSOCIATION OF ORANGE COUNTY DEPUTY SHERIFFS

Electronic Service

I caused the documents to be sent to the persons at the electronic notification addresses listed above from the electronic notification address: kaviles@opengovlaw.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: February 7, 2019

/s/ Albert D. Aviles
Albert D. Aviles